United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1159

To be argued by
IVAN MICHAEL SCHAEFFER

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

GANDOLFO ALBANESE,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

DAVID J. TRAGER,
United States Attorney,
Eastern District of New York.

IVAN MICHAEL SCHAEFFER,
Attorney,
United States Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Page

Cases:

STATUTES AND RULES

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

75-1159

UNITED STATES OF AMERICA,
Appellee

v.

GANDOLFO ALBANESE,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the evidence against appellant was sufficient to sustain his convictions.

2. Whether there was sufficient evidence to establish jurisdiction in the Eastern District of New York.

3. Whether the giving of an instruction subsequently withdrawn upon objection of appellant deprived him of a fair trial.

4. Whether appellant was properly sentenced without a presentence report.

STATEMENT

Appellant, along with Jerry Battiloro, Stephen Goronsky, Frank DuBois, and Nicholas Gregoris, a/k/a "El D" and "Nick The Greek," was charged in a three

count indictment returned in the United States District Court for the Eastern District of New York with one count of conspiracy to distribute and to possess with intent to distribute heroin and with two counts of distribution of heroin, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1).[1] Following a jury trial (Judd, J.) appellant was found guilty on each count of the indictment and was sentenced to concurrent terms of nine years' imprisonment on each count to be followed by a six year term of special parole.

The Government's Case:

1. *The April 29, 1974 Distribution*

In the Spring of 1973 Jerry Battiloro asked Frank DuBois about a possible source for the purchase of heroin. DuBois advised Battiloro not to become involved with narcotics. Battiloro again contacted DuBois about a year later, again seeking a source of supply for heroin. At this time DuBois, while warning Battiloro of the dangers in the "occupation" promised to see what he could do. DuBois attempted to stall in locating a connection but Battiloro and Goronsky came back to him again requesting his assistance. At first, DuBois introduced Battiloro and Goronsky to a person named "Vinnie." They, together with Nicholas Gregoris, a/k/a "El D", met with Vinnie in Brooklyn. This meeting did not result in a source of supply and DuBois continued to seek heroin for Battiloro and Goronsky. About a week later DuBois met with appellant, a long time acquaintance, at appellant's butcher shop on Christie Street in Lower Manhattan (Tr. 64-68).

At this meeting, which occured sometime in April, 1974, DuBois asked appellant if there was any heroin avail-

---

[1]On February 7, 1975 DuBois pleaded guilty to the conspiracy count of the indictment. Battiloro and Goronsky entered guilty pleas on March 4, 1974. Gregoris was a fugitive at the time of appellant's trial and is now awaiting trial.

able which he could obtain for two long-time friends of his. He told appellant that his friends were Battiloro and Goronsky and explained that Goronsky had been his son's partner. Appellant told him to return in a day or two. When DuBois returned, appellant told him that he could obtain heroin for him at $4,500 for an eighth of a kilogram. DuBois reported back to Battiloro and Goronsky and they stated that this was acceptable. DuBois then informed appellant that the price was acceptable to Battiloro and Goronsky. Appellant told DuBois that DuBois would have to make the first deliveries himself and that after that "we'll play it by ear" (Tr. 72). Following this agreement appellant and DuBois met at appellant's butcher shop, sometime around late April or early May and appellant gave DuBois an eighth kilogram of heroin. DuBois proceeded with the heroin to Coney Island Avenue and Church Avenue, Brooklyn, where he was met by Battiloro. DuBois opened the trunk of his car and Battiloro removed the package given DuBois by appellant (Tr. 69-75).

In the Spring of 1974 Drug Enforcement Administration ("DEA") undercover agent Nicholas Alleva was working in plain clothes pretending to be interested in purchasing drugs (Tr. 18-19). On April 24, 1974, Alleva met with Battiloro and Goronsky at the Ridge Diner in Brooklyn; they informed him that they could acquire heroin for him from Hong Kong at $5,300 for an eighth of a kilogram (Tr. 20). Battiloro and Goronsky discussed the quality of the heroin with Alleva. Goronsky provided him with a sample of the heroin which they claimed they could supply (Tr. 20-21). Alleva told Battiloro and Goronsky that he would test the sample and asked them to call him the following evening (Tr. 21). Alleva had the sample field tested at the DEA's regional office in New York. The test revealed that the substance was heroin (Tr. 22).

On April 25, 1974 Alleva told Battiloro that the quality of the heroin was not as good as Battiloro had represented it to be, but that it would be acceptable. Alleva said that he would take an eighth of a kilogram to start with and they agreed on the $5,300 price (Tr. 23).

Alleva met Battiloro on April 29, 1974, at 10:00 p.m., on the corner of 86th Street and 21st Avenue in Brooklyn (Tr. 23). Battiloro informed Alleva that they would have to drive to an apartment to pick-up the heroin. Alleva objected, not wanting to take the money to the unknown apartment. Battiloro told him he need not bring the money with him; that he could test the heroin and take it if he liked without prior payment. Alleva reported this arrangement to another DEA agent who was waiting with the money in a phone booth a block from Alleva's meeting place. Alleva then entered Battiloro's car and drove to an apartment at 1853 20th Street in Brooklyn, to which they were admitted by Goronsky. Battiloro went out of the rear door of the apartment into the backyard and returned with a cigar box which he handed to Alleva. Alleva opened the box, found a package inside and tested its contents which proved to be heroin. Battiloro told Alleva that "there would be plenty more where that came from" (Tr. 25), and informed him that they could do business on a regular basis. Alleva took the cigar box and its contents and had Goronsky drive him back to 86th Street and 21st Avenue for the money. Goronsky waited in the car while Alleva took the cigar box to the waiting DEA agent and got the money. Alleva then gave Goronsky $5,300 (Tr. 23-25). Battiloro met DuBois early the following morning to pay him for the shipment. DuBois took the money to appellant at his butcher shop (Tr. 75).

2. *The May 8, 1974 Distribution*

About a week or ten days later DuBois returned to appellant's shop and told him that Battiloro wanted four eighth of a kilogram packages but recommended that he only provide two. Appellant questioned DuBois' judgment, thinking that it was better to deliver the four packages thereby saving additional deliveries. Appellant agreed, however, to provide only two packages. DuBois and appellant then drove to Riverdale where appellant obtained two packages and placed them in the back of the car. DuBois subsequently delivered the package to Battiloro at the Big S Transmission Shop at Coney Island Avenue and Church Avenue in Brooklyn. On arriving at the Big S DuBois opened the trunk of the car and Battiloro removed a cigar box which contained the two packages (Tr. 76-80). After a brief conversation, DuBois returned to his car and drove off; Battiloro went back to the Big S and appeared to enter the office area. Battiloro then left the Big S with a coat which appeared to be concealing a bulky object over his arm. A short while later, he again entered the same car and drove to his residence where he parked his car. At this point, a narcotics agent who had Battiloro under surveillance and had observed the transfer of heroin looked into Battiloro's car and saw a package wrapped in brown paper partially visible under the front seat (Tr. 177-179).

Battiloro called Alleva again on May 7, 1974 to inquire whether he was ready for another deal. Alleva stated that he was, but that he wanted a larger quantity of heroin. Battiloro said that he could not get him more than a quarter of a kilogram at that time. Alleva agreed to take that amount and arranged to meet

Battiloro the following evening, May 8, 1974, at Avenue P and Coney Island Avenue in Brooklyn. Alleva was accompanied to this meeting by DEA Agent Paul Sennett who he instructed to wait at a specified location with $10,600, which was payment for the quarter of a kilogram Alleva proceeded to Avenue P and Coney Island Avenue and there got into Battiloro's car. Battiloro told Alleva that he could get him an additional quarter of a kilogram at 2:00 a.m. the following morning. Alleva informed him that he would be unable to take the additional heroin at that time but requested Battiloro to speak to his people about providing an entire kilogram at the next meeting so that they "would not have to keep coming back and forth" (Tr. 28). Battiloro told Alleva that he would do that; that a constant supply of heroin existed from which they could continue dealing; but that his people wanted to build up to larger quantities as opposed to providing a large package at one time.

Battiloro and Alleva then arrived at 1560 Ocean Parkway, Brooklyn, and took the elevator to the third floor of the building where they proceeded to an apartment to which they were admitted by Goronsky. Goronsky and Battiloro both pointed to a table in the foyer on which sat a brown paper bag containing a box with heat-sealed envelopes containing heroin. Alleva again asked Battiloro to have his people come out and discuss a deal with him. Battiloro responded by saying that he never really saw his people but he spoke to them and picked up his packages at a drop. Goronsky drove Alleva back to Avenue P where Alleva told Sennett that all had gone smoothly. Sennett handed Alleva the $10,600 which he then gave to Goronsky (Tr. 27-30).

Battiloro met DuBois again the following morning at a diner in Coney Island where he paid DuBois for the heroin. A day later DuBois took the money to appeliant at his butcher shop (Tr. 80).

3. *The Arrests of Battiloro, Goronsky and DuBois*

Approximately a week or ten days later Battiloro again approached DuBois for heroin. They argued since DuBois wanted to terminate his part in the arrangement. Battiloro asked DuBois to get him four packages and that he would not bother him any further. DuBois related the story to appellant and told him to give Battiloro and Goronsky only two packages. Appellant told DuBois, "You got to make a delivery for one, so you could just make four and its less weight on you" (Tr. 81). Appellant gave DuBois two packages at that time. That afternoon while DuBois was in his car in front of appellant's butcher shop, appellant came out of the shop and placed a shirt on a hanger in the front of the car. Under the shirt were two more packages of heroin tied to the hanger. DuBois told appellant he wanted to make a stop to see Vinnie and "El D" but appellant told him not to, just to keep going. DuBois once again delivered the heroin to Battiloro at Coney Island Avenue and Church Avenue (Tr. 80-81).

On May 14, 1974, Battiloro again called Alleva and asked if he was ready for another deal. Alleva responded affirmatively and Battiloro told him that the most he could obtain for him would be half of a kilogram. Alleva agreed and Battiloro instructed him to meet him at 79th Street and Lexington Avenue in Manhattan the following evening. Sennett once again accompanied Alleva, this time carrying $21,000. Sennett and Alleva met Battiloro as arranged and Alleva told Sennett to take the money to their predetermined meet-

ing place. Battiloro and Alleva then proceeded to Battiloro's car in which Goronsky was waiting. They then proceeded to 515 East 62nd Street and went into an apartment. Goronsky stayed at the window as a lookout while Battiloro directed Alleva to the bathroom and opened the medicine cabinet which contained four plastic bags, each of which containing an eighth of a kilogram of heroin. Alleva placed the bags in a brown paper bag. They then left the apartment and returned to the area in which Sennett was waiting. Battiloro and Goronsky waited for Alleva on East 78th Street between 2nd and 3rd Avenues while he ostensibly went to obtain the money. Instead, Alleva went into the Short-Tall Bar at 78th Street and 3rd Avenue and informed his group supervisor that he had the heroin. At this time Battiloro and Goronsky were arrested (Tr. 31-34), and DuBois never received payment for the final shipment (Tr. 80-81).

Upon learning that Battiloro and Goronsky were arrested DuBois went to tell appellant that he could not pay him for the final shipment. They met at 11:00 a.m. on the morning following the arrests. DuBois informed appellant of the arrest and appellant then accused him of trying to withhold payment for the heroin (Tr. 82-84

The day after their arrest Battiloro and Goronsky were arraigned in district court. Frank DuBois, accompanied by his attorney, after leaving appellant's butcher shop went to court to watch the proceedings. DuBois was recognized by a DEA agent as the man who had delivered a package containing heroin to Battiloro and was placed under arrest (Tr. 83).

After being released on bail DuBois again met with appellant in his butcher shop. Appellant again accused DuBois of lying to him and stated that either he or Battiloro and Goronsky had the $14,000. Following this meeting DuBois agreed to cooperate with the government and agreed to wear a transmitting device the next time he met with appellant (Tr. 82-84).

4. *The Recording of Appellant's Conversation with DuBois*

On May 31, 1974, DuBois, equipped with a transmitting device, spoke with appellant at the butcher shop. Appellant told DuBois he wanted the money owed him. DuBois responded by telling appellant that he would give it to him if he had it. Appellant said, "These people don't play and you're playing with death" (Tr. 84). Appellant told DuBois that he would arrange for him to meet his people at a topless bar called Bills on 22nd Street (Tr. 85-86).

On June 3, DuBois attended the meeting, this time wearing a recording device. Appellant and DuBois discussed how DuBois would get the $14,000 he owed appellant (Tr. 85-86). Appellant told DuBois that his suppliers wanted their $14,000 payment for the drugs. He stated that he had to come up with something; that he could not work; that he could not continue to get credit unless he made his payments. Appellant than suggested to DuBois that he come up with $5,000 and work the rest off in future transactions. DuBois suggested to appellant that his former partner in criminal activities, Bill Rupoli, who was Goronsky's stepfather, might be willing to help him out since he was acting for his step-son.

During the course of their conversation appellant and DuBois discussed the prior transactions with Goronsky and Battiloro; they talked about the series of sales; and appellant commented that Goronsky and Battiloro were foolish for failing to get the money "up front." At one point in their conversation, appellant stated that he only dealt with Battiloro and Goronsky through Du-Bois and not independently; at another point appellant recalled taking the shirt with the "two pieces" —*i.e.*, two packages of heroin—on the hanger to DuBois' car (Gov't Ex. 6; Tr. 93-136). This meeting was observed by DEA agents and, at trial the tape of the conversation between appellant and DuBois was admitted into evidence (Tr. 179-185; 193-195; 198-203).

The Defense Case:

The appellant did not testify on his own behalf or offer any witnesses to rebut the government's testimony. The entire defense case consisted of two character witnesses who both testified that appellant had a good reputation in the community for veracity and that he was a law-abiding citizen (Tr. 219-225).

ARGUMENT

I—THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION AS TO ALL COUNTS

Appellant argues that the evidence was insufficient to sustain his conviction on the substantive counts. Specifically, he contends that the government did not show that the heroin that appellant supplied to DuBois was the same heroin that Battiloro and Goronsky sold to Agent Alleva, suggesting that "Vinnie" may have been the supplier to Battiloro and Goronsky. However, the facts when viewed in the light most favorable

to the government, *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *D'Avanzo*, 443 F.2d 1224, 1225 (2nd Cir.), *cert. den.*, 404 U.S. 850 (1971); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2nd Cir. 1972) show not only that appellant, through his go-between DuBois, distributed heroin on April 29 and May 8, 1974, as charged, but that this heroin was the heroin that Agent Alleva bought from Battiloro and Goronsky.

The testimony of DuBois, Agent Alleva, Agent Lieneck, and the tape recording of appellant's conversation with DuBois at Bill's bar provided the evidence that appellant claims is lacking. Thus, DuBois testified that in April 1974, he requested appellant to provide a connection for a supply of heroin for Goronsky and Battiloro (Tr. 68). At this meeting, DuBois told appellant the names of his two long time friends and explained that Goronsky was his son's former partner (Tr. 69). Appellant established a price which DuBois took back to Battiloro and Goronsky and after its acceptance insisted that DuBois act as the courier for the first several transactions (Tr. 70, 72). In late April, appellant provided DuBois with an eighth of a kilogram of heroin which the latter placed in the trunk of his car and drove to Brooklyn where Battiloro took the package from him (Tr. 74). Thereafter, on April 29, Alleva purchased an eighth of a kilogram of heroin from Battiloro and Goronsky (Tr. 23-25). The following morning DuBois received the proceeds of the sale from Battiloro and returned to appellant's butcher shop to pay him for the heroin (Tr. 76- 80).

DuBois also testified to receiving a quarter of a kilogram of heroin from appellant approximately a week or ten days after the first transaction (Tr. 76). DuBois

drove with appellant to Riverdale where appellant obtained two packages of heroin which he placed in the back of DuBois' car (Tr. 77-78). DuBois then drove to the Big S Transmission Shop on Coney Island Avenue in Brooklyn where he opened the trunk of his car and Battiloro removed the box containing two packages of heroin (Tr. 79). The entire transaction was observed by Agent Lieneck who saw Battiloro receive the heroin from DuBois and watched him place it in his own car (Tr. 178). Thereafter, Agent Alleva purchased the same quantity of heroin that night from Battiloro and Goronsky, packaged in the same manner, as Battiloro had received it from DuBois and DuBois from appellant (Tr. 27). The following morning Battiloro met DuBois in a Brooklyn diner to pay for the heroin (Tr. 80). Once again DuBois drove to appellant's butcher shop the following day to pay him for the previous day's shipment (Tr. 80).

Furthermore appellant's connection with Battiloro and Goronsky is documented by his own taped conversation with DuBois. In that conversation appellant acknowledged throughout his knowledge of Goronsky and Battiloro and expressed fear due to his inability to pay his own suppliers for the last shipment of heroin for which he was never paid due to Battiloro and Goronsky's arrest (Tr. 93-125, 128-136). Appellant repeatedly chided Battiloro and Goronsky for not receiving payment for the narcotics prior to making delivery (Tr. 101-102, 108), and discussed with DuBois, at length, a method of getting money from Goronsky's step-father to help put up a sizeable portion of the money due his suppliers (Tr. 93-94, 103-106, 109-110). Appellant also expressed his displeasure with the amount of information "Vinnie" had about appellant's transactions (Tr. 111). Further, appellant discussed with DuBois bringing a shirt to DuBois' car with "two pieces" on the hanger

(Tr. 116). Appellant, at another point remarked: "Let me tell you something. If I was dealing with those two kids, I would shoot the two of them right now. I wouldn't wait a fuckin minute. I would of shot the two of them a long time ago. Just for not being careful" (Tr. 123). The conversation leaves no doubt as to appellant's involvement as the supplier of the heroin to DuBois who was, at appellant's behest (Tr. 70, 72) acting as his gobetween with Battiloro and Goronsky.

Finally, insofar as appellant suggests that "Vinnie", rather than he may have been the source of the heroin sold to the agent, this is refuted by the evidence. DuBois testified that he attempted to establish a connection for Battiloro and Goronsky with Vinnie and that he had in fact arranged a meeting between them albeit without success (Tr. 67-68). Only following DuBois' failure to arrange a connection with Vinnie did he approach appellant (Tr. 68). Alleva attempted to get Battiloro to reveal his source so that he could deal directly and obtain larger quantities of heroin than Battiloro and Goronsky were making available to him (Tr. 28-29). Battiloro told Alleva that he never really saw his people but spoke with them and picked up packages at a drop (Tr. 29). This evidence would be inconsistent with Vinnie being a source of supply, since Battiloro had met Vinnie and knew who he was (Tr.67), and therefore would probably not refer to him as an unknown person. Appellant on the other hand was unknown to Battiloro since he dealt through DuBois.

In sum, we submit that the evidence adduced supported a finding, if such finding was necessary, that the heroin appellant supplied to DuBois was ultimately purchased by Agent Alleva from Battiloro and Goronsky. We believe that the close working relationship between DuBois and appellant supports the inference that the

narcotics purchased by Alleva was supplied by appellant. See, *e.g.*, *United States* v. *Baratta*, 397 F.2d 215, 224 (2nd Cir.), *cert. den.*, 393 U.S. 939 (1968); *United States* v. *Sisca*, 503 F.2d 1337 (2nd Cir.) *cert. den.*, 419 U.S. 1008 (1974); *United States* v. *Cirillo*, 468 F.2d 1233 (2nd Cir.) *cert. den.*, 410 U.S. 987 (1972).

II—JURISDICTION PROPERLY EXISTED IN THE EASTERN DISTRICT OF NEW YORK

Venue for the crimes charged was properly laid in the Eastern District of New York. As to the substantive offense, under 18 U.S.C. 3237(a), an offense begun in one district and completed in another, is committed in more than one district, and may be prosecuted in any district in which such offense was "begun, continued, or completed." See *United States* v. *Candella*, 487 F.2d 1223, 1227, 1228 (2nd Cir.) *cert. den.* 415 U.S. 977 (1973). Here it is clear that the drugs provided DuBois by appellant in the Southern District of New York were supplied for delivery to Battiloro and Goronsky in the Eastern District of New York, and were so delivered . That the Eastern District was a proper forum for these counts, therefore, cannot be seriously challenged. As to the conspiracy charge, it has long been established that such a prosecution may be maintained in any district where the agreement was made or where one or more of the overt acts were committed. *Hyde* v. *United States*, 225 U.S. 347, 359 (1912); *Dealy* v. *United States*, 152 U.S. 539, 547 (1894); *United States* v. *Nathan*, 476 F.2d 456, 461 (2nd Cir.) *cert. den.* 414 U.S. 823 (1973). For the court to acquire jurisdiction it is not necessary that all defendants have performed overt acts or even have been within the district during the existence of the conspiracy. *United States* v. *Campisi*, 248 F.2d 102, 107 (2nd Cir.), *cert. den.*, 355 U.S. 892 (1957);

United States v. *Rivard*, 375 F.2d 882, 886 (5th Cir.) *cert. den. sub nom. Groleau* v. *United States*, 389 U.S. 884 (1967). Should appellant have felt that defending this case in the Eastern District would have worked some injustice he could have moved to transfer the case to the Southern District pursuant to Rule 21(b), Fed.R.Crim.P. *Cf. United States* v. *Cashin*, 281 F.2d 669 (2nd Cir. 1960).

III—AN INSTRUCTION WHICH THE COURT WITHDREW AT APPELLANT'S REQUEST DID NOT DEPRIVE HIM OF A FAIR TRIAL

At the close of the government's case, defense counsel, in arguing for acquittal, contended that there was no proof that the heroin that DuBois received from appellant was the same heroin that the agent purchased from Battiloro and Goronsky. He also argued that "DuBois testified that there was another supplier involved with these people" (App. 9a-15a). Thereafter, in his charge to the jury the district court stated:

> Mr. Rosenkrantz, pointed out it is possible the heroin which Battiloro and Goronsky sold to Agent Alleva was something that they got from another heroin dealer or that the packages that were analyzed by the chemists were not in fact the packages that Mr. Albanese delivered to Mr. DuBois. You can determine from the evidence whether this leaves you with any reasonable doubt that the heroin that was purchased by the agent did in fact come from Mr. Albanese [App. at 36a].

Following the charge to the jury, counsel for appellant objected to the above quoted instruction since it did not reflect an argument made to the jury but rather an argument which counsel had made to the court outside the presence of the jury.

MR. ROSENKRANTZ: I would specifically except to your Honor's charge in which your Honor indicated to the jury that it was my argument that Mr. Albanese may have delivered heroin to Mr. DuBois but that this was not the same heroin that Battiloro and Goronsky were alleged to have received. I did not make that argument before the jury. I made that argument—that was a legal argument presented to the Court out of the presence of the jury, and I at no time conceded to the jury. [App. 41a-42a.]

The court and counsel for appellant then engaged in the following colloquy:

THE COURT: I thought what I said was somewhat favorable, indicating it might be what the chemist analyzed was not what he gave to them.

MR. ROSENKRANTZ: I wish you would make clear to the jury I do not concede he passed heroin or knowingly passed heroin to Mr. DuBois.

THE COURT: I thought that was obvious, but—let me see what I said.

No, I said—Maybe I was wrong in saying you had pointed out, but the packages analyzed by the chemist were not the packages delivered to Mr. DuBois. You don't concede that anything was delivered to him.

MR. ROSENKRANTZ: That's correct.

THE COURT: Let me get them in to tell them that.

* * * * *

THE COURT: Bring them back.

(Jury enters the jury box.)

THE COURT: I have just one thing to add. I spoke about the possible defense the packages analyzed by

> the chemist were not the packages delivered to Mr. DuBois. The defendant does not concede that any packages were delivered to DuBois by Mr. Albanese. That's for you, to determine on the basis of all the evidence in the case.

Although appellant neither objected to the curative instruction nor moved for a mistrial, he now suggests for the first time on appeal how he believes such an instruction should have been phrased and that the curative instruction as given was ineffectual. We submit that what occured here did not deprive appellant of a fair trial and that the contention made here is an afterthought which should not be allowed to be raised for the first time on appeal. *United States* v. *Martin*, 475 F.2d 943, 946 (D.C. Cir. 1973), see also *United States* v. *Smart*, 448 F.2d 931, 936 (2nd Cir.), *cert. den.*, 405 U.S. 998 (1971). Absent plain error, Rule 52(b), Fed.R.Crim.P., which we clearly believe to be absent here, there is no basis for reversal based on the instruction which was immediately corrected without any objection by counsel. The mistake in the court's original instruction was certainly harmless following the court's curative instruction.

IV—APPELLANT WAS PROPERLY SENTENCED WITHOUT A PRE-SENTENCE REPORT

In sentencing appellant the district court, in exercise of its sound discretion, dispensed with the preparation of a pre-sentence report, see Rule 32(c)(1), Fed.R.Crim.P. In exercising its discretion the court placed on the record the reasons it felt this to be an appropriate case to sentence without a report. First, the court felt that the age and health of the government's chief witness made it desirable to avoid any delay in the event this Court were to order a retrial.

Second, the appeal could be processed six or seven weeks faster if a pre-sentence report were not ordered. Third, the court felt that it was aware of all of the facts and any possible extenuating circumstances in the case since it tried not only appellant but also his co-defendants and noted that it had heard all of the cross-examination and character witnesses for the appellant. In addition, the court revealed that it had received and reviewed an "impressive group of letters attesting to defendant's respect in the community and his general good character to which this particular line of work is apparently an exception" (Sent. Tr. 4). Finally, the court noted that "this is a serious narcotics case with a substantial sale by a non-addict, where generally deterrence is the main factor and probation is out of the question and where a long sentence is appropriate . . . I think comparative culpability is a more important factor than personal characteristics—than possibilities of rehabilitation." *Ibid.* Nonetheless, the court indicated a clear willingness to read with an open mind whatever motions for reduction of sentence counsel might file after perfecting his appeal (Sent. Tr. 6). Appellant contends that, in the event of affirmance of his conviction, his case should be remanded for resentencing.

This Court has recognized that "the district judge's broad sentencing powers, . . . still include under the plain language of Fed.R.Crim.P. 32(c)(1) the power in his discretion not to order any presentence report, even in a serious felony case." *United States* v. *Manuella*, 478 F.2d 440, 441 (2nd Cir. 1973); see also *United States* v. *Warren*, 453 F.2d 738, 743-744 (2nd Cir.), *cert. den.*, 406 U.S. 944 (1972). In *Manuella* this Court held that delay in sentencing and appeal occassioned by the delay in obtaining a pre-sentence re-

port was not a factor which would justify dispensing with the pre-sentence report. *Accord United States* v. *Frazier*, 479 F.2d 983, 986-987 (2nd Cir. 1973). However, here there were a series of additional factors —all of which we believe to be valid—which made this case one in which the district court did not abuse its discretion in proceeding without a pre-sentence report. We feel that the situation here is closer to that faced by the Court in *United States* v. *Heng Awkak Roman*, 484 F.2d 1271, 1272-1273 (2nd Cir.), *cert. den.*, 415 U.S. 978 (1973). In that case, like the instant case, the district court dispensed with the pre-sentence report not because of the delay in obtaining such a report but because the court considered that it would be of little value in sentencing the defendant. Inasmuch as the district judge stated his reasons for dispensing with the presentence report, we believe that the court's action was within the teaching of *United States* v. *Warren*, *supra.*, requiring that reasons be given for dispensing with the pre-sentence report.

As for *United States* v. *Rosner*, 485 F.2d 1213, 1229-1231 (2nd Cir.), *cert. den.*, 417 U.S. 950 (1973), upon which appellant relies, it is totally inapplicable to the case at bar. That case involved a presentence report prepared by the prosecutor as opposed to a neutral professional in the probation office; the trial court retained the report *in camera* for more than two months prior to sentencing; the report was only shown to defendant's counsel on the morning of sentencing;

and the district court denied counsel's request for a continuance to contradict the report. 485 F.2d at 1231[2].

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

DAVID J. TRAGER,
United States Attorney,
Eastern District of New York.

IVAN MICHAEL SCHAEFFER,
Attorney,
United States Department of Justice,
Washington, D.C. 20530.

---

[2]Appellant attempts to raise an additional issue on appeal by letter to Chief Judge Kaufman, dated June 27, 1975. Appellant's brief was filed on June 6, 1975, yet some three weeks later he seeks to raise the issue of the authority of the government special attorney to appear before the grand jury which indicted him. This claim is seriously out of time and, therefore, should not be considered. See *United States* v. *Spector*, 343 U.S. 169, *rehearing denied*, 343 U.S. 951 (1952). In any event, appellant's contention has now been definitively disposed of by Judge Weinstein's scholarly opinion in *In re Grand Jury Subpoena of Alphonse Persico*, No. 75- 2030, decided June 19, 1975, on which we rely.

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief for the United States were served on Richard I. Rosenkranz, Esq., attorney for appellant, at 66 Court Street, Brooklyn, New York, 11201 this 9th day of July, 1975.

IVAN MICHAEL SCHAEFFER
Attorney,
Department of Justice,
Washington, D.C. 20530.